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IN THE

Supreme Court of the United States

NO. 1152

OCTOBER TERM, A. D. 1964.

WILLIAM J. SCOTT (As Treasurer of the State of Illinois and Member of the Illinois Electoral Board), CLYDE BEALS, DAVID DAVIS, JOSEPH R. MALLORY, WILLIAM McKNIGHT, JR., CARL SCHWEINFURTH, HAROLD B. STEELE, MRS. FAYE STRIEBINGER and the ILLINOIS AGRICULTURAL ASSOCIATION, Appellants, VS. **JOSEPH GERMANO, JOHN ALESIA, JOSEPH CESARIO, LEO KEFFER, RAYMOND SAROCCO, SAM E. PERISH, JOSEPH POCHERVINA, BUDDY W. DAVIS, OTTO KERNER, as Governor of Illinois and Chairman of the State Electoral Board; PAUL POWELL, as Secretary of the State of Illinois and Secretary of the State Electoral Board; WILLIAM G. CLARK, as Attorney General of the State of Illinois and Member of the State Electoral Board; and MICHAEL J. HOWLETT, as Auditor of Public Accounts of the State of Illinois and Member of the State Electoral Board,** Appellees.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

MOTION TO AFFIRM

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MOTION TO AFFIRM

Appellees Otto Kerner, Governor of the State of Illinois and Chairman of the State Electoral Board; Paul Powell, Secretary of State of the State of Illinois and Secre-

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tary of the State Electoral Board; William G. Clark, Attorney General of the State of Illinois and a Member of the State Electoral Board; and Michael J. Howlett, Auditor of Public Accounts of the State of Illinois and Member of the State Electoral Board, pursuant to Rule 16 of the Revised Rules of the United States Supreme Court move that the final judgment and decree of the District Court be affirmed on the ground that the decision of the Federal District Court for the Northern District of Illinois is clearly correct and therefore it is manifest that no question so substantial as to warrant further argument is raised.

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STATEMENT

This suit, involving the constitutionality of the apportionment of the Illinois Senate, was commenced February 18, 1963. On March 19th of that year the Illinois Attorney General, representing all the parties defendant at that time, filed a motion to dismiss for want of jurisdiction or, in the alternative, for failure to state a cause of action and a second alternative motion that the court forbear. The three-judge Federal District Court dismissed the complaint on July 29, 1963, in a two to one decision, which held the Illinois senatorial apportionment constitutional (*Germano* v. *Kerner*, 220 F. Supp. 230).

The case was appealed to this Court and on June 22, 1964, the decision was reversed and remanded "for further proceedings consistent with the views stated in our opinions in *Reynolds* v. *Sims* and in the other cases relating to state legislative apportionment decided along with *Reynolds*" 378 U. S. 560.

Pursuant to the decision and mandate of this Court, the case was redocketed in the Federal District Court for the Northern District of Illinois where the plaintiffs made a motion for an order implementing this Court's decision. Briefs were filed by all the parties by December 10, 1964, and the matter was taken under advisement. On January 22, 1965, the following order was entered by the Court:

> "In obedience to and in implementation of the Remand Order of the Supreme Court herein dated July 20, 1964, it is hereby ordered:
>
> "1. That the plaintiff's amend within 10 days their complaint to include as parties defendant, and cause process to be issued and served on all present members of the Illinois General Assembly.

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"2. That because of the constitutional infirmities contained in certain provisions of Sec. 6 Article IV of the Illinois Constitution and Ill. Rev. Stats. Ch. 46 Sec. 158-1 to 158-5, requiring the apportionment of State Senatorial districts on the basis of area, which provisions the Supreme Court has found herein to violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, no election of Illinois State Senators may hereafter be held pursuant to said constitutional provision and legislation.

"3. That any implementation, amendment or substitution of all or part of the said defective portions of the said constitution or legislation be submitted to and approved by this court before the holding of any election pursuant thereto, to determine pursuant to the aforesaid mandate satisfactory compliance with the guidelines set forth in the related and applicable decisions of the United States Supreme Court.

"4. That in the event of no such implementation, amendment or substitution of the constitutionally defective method of election of Illinois state senators is approved by this court, as above provided, a rule shall issue forthwith directing the parties defendant herein, including those added pursuant to paragraph 1 of this order, to show cause why all Illinois state senatorial seats shall not be filled at and by a general at-large election at the time presently scheduled for the 1966 elections, and every four years thereafter.

"5. That this court retains jurisdiction to afford such relief as may be necessary to effectuate this Order."

Meanwhile, on April 28, 1964, the case of *People ex rel Engle* v. *Kerner* was filed in the Circuit Court of Sangamon County, Illinois. In that case it was contended that the 1954 amendment to the Constitution of

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Illinois, which established the constitutional basis for the apportionment of the Illinois Senate, was not adopted validly under the law of Illinois governing constitutional amendments. The suit was dismissed on the pleading by the trial court, and the plaintiff appealed to the Illinois Supreme Court. In his brief, in that case, the plaintiff buttressed his arguments by reference to the decision of this Court of June 22, 1964, in the *Germano* case. Briefs were filed with the court by January 18, 1965, and the case was argued on that day. The decision and opinion of the court was filed February 4, 1965, and a rehearing was subsequently denied. In that opinion the Illinois Supreme Court held that the amendment was validly adopted and while the provisions for area apportionment of the Illinois Senate were void under *Reynolds* v. *Sims,* the other provisions of Section 6 of Article IV of the Illinois Constitution which govern the apportionment of the Illinois Senate are separable and are valid if in their application the equality-of-population principle is not significantly diluted. Finally, the court said that:

> "[W]e retain jurisdiction of the cause for the purpose of taking such affirmative action as may be necessary to insure that the 1966 election is pursuant to a constitutionally valid plan." (32 Ill. 2d 212, at 225.)

After this decision was entered, the appellants herein filed a motion with the Federal District Court to reconsider and vacate its order of January 22, 1965, because the Illinois Supreme Court had taken jurisdiction of the issue. This motion was denied May 7, 1965 and an opinion attached to the jurisdictional statement as Appendix "A" was filed by the court explaining its order. The appellants then filed their appeal from that order.

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ARGUMENT

The basic issue in this appeal can be simply stated: Whether the Federal District Court for the Northern District of Illinois was required to withdraw its order entered pursuant to the mandate of this Court and concerned solely with a federal question because the Illinois Supreme Court subsequently took jurisdiction of the same issue? It is the contention of the appellees represented by this motion that the answer is so clearly in the negative, that no substantial question is raised, and this motion to affirm should be granted pursuant to Rule 16 of this Court.

The United States Constitution in Article III vests the judicial power of the United States in "one supreme court and in such inferior courts as the congress may, from time to time, ordain and establish." (Art. III, Sec. 1), and defines the extent of that power in Section 2:

> "The judicial power shall extend to all cases, in law and equity arising under this Constitution and the laws of the United States, . . ."

This case is properly in the Federal District Court because it arises under the Constitution of the United States. Where it exists, the judicial power of the United States is superior to that of any state court. *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, (14 U. S.). This superiority is well exemplified by *habeas corpus* practice where a federal district court may order a prisoner released on grounds that his constitutional rights were violated though on the same facts the highest court of a State affirmed the conviction. While it is of course true that of questions of State law the decision of the highest court in the State is final, the instant case in its present posture presents no question of State law.

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The Federal District Court, in its order of January 22, 1965, declared that the provisions of the Illinois Constitution governing the apportionment of the Illinois Senate are invalid to the extent that they require that the apportionment be based on area. In the *Engle* case the Illinois Supreme Court declared those provisions separable and the remainder of the provisions of Section 6 of Article IV of the Illinois Constitution valid insofar as they do not conflict with the equality-of-population principle required by the Equal Protection Clause of the Federal Constitution. Thus the present case involves only the question of whether the Senate of the State of Illinois is to be apportioned as required by the United States Constitution under those provisions of the Illinois Constitution that do not violate the Federal Constitution. Thus the only questions presently pending relate strictly to the requirements of federal law and are thus subject to the judicial power of the United States properly exercised by the Federal District Court.

In this context, it should be noted that in its Memorandum and Order of May 7, 1965, that Court stated:

> "We have already indicated our intention to comply with the spirit of *Lucas* and avoid deciding ancillary issues of state law. We were requested by the parties in this case, prior to our Order of January 22, 1965, to decide issues of state law such as the possible severability of portions of the State election statute we held invalid. We declined this request. Parenthetically it might be observed that it was after our declination that newly acquired attorneys for defendant Scott sought to have the same issues decided by the Illinois Supreme Court in the *Engle* case.
>
> "To the extent that it might be deemed necessary or advisable we reaffirm our intention not to impose ourselves upon Illinois court determinations of issues solely decidable on the basis of Illinois law."
>
> (Memorandum and Order pp. 19-20)

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The propriety of the action by the Federal District Court is necessarily enforced where that court, as here, enters its order under the mandate of this Court.

In this context, it should be noted that the power of the Illinois Supreme Court to retain jurisdiction to insure that the Illinois Senate will be apportioned in accord with state law is not here challenged. All that is asserted is that such an order can not and does not preempt the right of the Federal District Court to insure that an election is held in Illinois in accord with the requirements of the federal law.

Because of the superior jurisdiction of the federal district court, all cases involving a federal question which are instituted in a state court may be removed by the defendant to a federal court. (28 U. S. C. 1441). In effect, appellants are here urging the contrary position—that a federal court considering a federal question should relinquish its jurisdiction because a state court is willing to supervise the case. There is no legal basis for such a position. The only doctrine under which a federal court will forbear in favor of a state court is that of abstention, and that principle is applicable only where a federal question is based on an interpretation of local law and that interpretation is in doubt. Under these circumstances, the local law should be interpreted by the local courts. (*Hillsborough* v. *Cromwell*, 326 U. S. 620, at p. 625; *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496). But here the state law has already been interpreted by the Illinois Supreme Court.

The statement of this Court in *Maryland Committee* v. *Tawes*, 377 U. S. 656, at p. 676:

> "We applaud the willingness of the state courts to assume jurisdiction and render decision in cases involving challenges to state legislative apportionment schemes."

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was made in a case which was originally brought in a state court and in which a federal court was never involved. It has no application to the present situation where a federal court first properly obtained jurisdiction. It must be remembered that the *Tawes* case could have been removed to a federal court.

These principles, which establish that the order of the Federal District Court retaining jurisdiction in this case is proper, have been reaffirmed by this Court in the area of reapportionment. One of the clearest expressions in this regard was that of this Court in *Forty-Fourth General Assembly of Colorado* v. *Lucas,* 85 S. Ct. 715. The Federal District Court entered an order in that reapportionment case pursuant to the mandate of this court (84 S. Ct. 1459). In that order the court granted complete relief ruling on questions of both federal and state law. Primarily the court held the invalid provisions of the Colorado Constitution not severable and invalid *in toto,* that subdistricting was not prohibited by Article V of the Colorado Constitution, and that the then forthcoming elections of the Colorado General Assembly should be conducted in conformity with Senate Bill No. 1 of a special session of that body. 232 F. Supp. 797 (1964).

Subsequently, the Supreme Court of Colorado in *White* v. *Anderson,* 394 P. 2d 333, ruled that subdistricting was invalid under Colorado law and that House Bill No. 1 was therefore invalid. However, because of the imminence of the election, they stayed the effect of their judgment until after the election and convening of the 45th General Assembly.

Thereupon the decision of the Federal District Court was appealed to this Court. The following decision was entered:

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"PER CURIAM.

"Insofar as the judgment of the District Court decides federal questions, it is affirmed. Insofar as the judgment decides other questions, it is vacated and the cause is remanded for further consideration in light of the supervening decision of the Colorado, Supreme Court in *White* v. *Anderson,* —— Colo. ——, 394 P. 2d 333 (1964).

MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE STEWART, and MR. JUSTICE GOLDBERG, concurring.

"It is our understanding that the Court's disposition of this case leaves it open to the District Court to abstain on the question as to the severability of he various provisions of Amendment No. 7, pending resolution of that issue with reasonable promptitude in further state court proceedings. We deem it appropriate explicitly to state our view that this is the course which the District Court should follow. On this basis, we join the Court's opinion. 85 S. Ct. at p. 715."

This case clearly establishes the principles previously developed in this motion. To the extent it decides federal questions, the jurisdiction of the Federal District Court is superior to that of any state court. It must defer to the state courts only on questions of state law. Here the Illinois Supreme Court has decided all the questions of state law involved in the present Illinois reapportionment controversy. All that remains is the determination of whether the Illinois General Assembly will reapportion the State Senate in accord with the requirements of federal law. As to that question, the jurisdiction of the Federal District Court is superior.

On a similar question in *Davis* v. *Mann,* 377 U. S. 678, this Court held in a reapportionment case at pages 690-691:

"Appellants' contention that the court below should have abstained so as to permit a state court to decide the questions of state law involved in this litigation is

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> without merit. Where a federal court's jurisdiction is properly invoked, and the relevant state constitutional and statutory provisions are plain and unambiguous, there is no necessity for the federal court to abstain pending determination of the state law questions in a state court. (*McNeese* v. *Board of Education,* 373 U. S. 668, 83 S. Ct. 1433, 10 L. Ed. 2d 622). This is especially so where, as here, no state proceeding has been instituted or was pending when the District Court's jurisdiction was invoked. We conclude that the court below did not err in refusing to dismiss the proceeding or stay its action pending recourse to the state courts."

Here in like manner the federal case was begun long before the state action. The questions of state law have already been decided by the state court. There is no ground upon which the Federal District Court should abdicate its jurisdiction in favor of the State Supreme Court.

Therefore, it is manifest that the Federal District Court, exercising the judicial power of the United States in a controversy which involves only questions of federal law, was correct in refusing to yield its jurisdiction to the State Supreme Court and its order should, therefore, be affirmed.

The right of the Federal District Court to retain jurisdiction over the federal questions involved in the reapportionment of the Illinois Senate having been established, the secondary issue of the conflict between its order and that of the Illinois Supreme Court becomes relevant.

On January 22, 1965, the Federal District Court ordered that if the State Senate was not reapportioned a rule would be entered to show cause why that body should not be required to run at-large. In its order of May 7, 1965, the Court stated that there were three reasons which dictated an at-large election if there was no reapportionment:

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1. Because mathematically an at-large election is the most perfect means of according full weight to the vote of each elector,
2. Because a judicial reapportionment would be an encroachment on the powers of the legislative branch and is beyond the traditional equitable powers of a court, and
3. Because the possibility of an at-large election would be an effective device to induce the General Assembly to adopt a reapportionment plan.

This order is within the equitable powers of the federal court and was entered in accordance with the mandate of this Court.

The order of the Illinois Supreme Court holding that it would insure a valid reapportionment if the General Assembly failed to act was in conflict with the terms and purposes of this order. Since the District Court in entering the order was exercising the judicial power of the United States, a power superior to that of any state court, the District Court properly refused to retract the order.

Furthermore, it is believed that the reasons asserted by the District Court as the basis for its order are clearly correct. An at-large election, with all the practical difficulties it entails, most fully accords to each voter the full weight of his vote. Each vote carries the exact same weight as any other. It is the perfect realization of "one man—one vote".

The traditional concept of the separation of powers dictates that a reapportionment plan should not be enacted by a court. In *Schnell* v. *Peter Echrich and Sons,* 365 U. S. 260, this Court said at page 263:

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> "[F]or us to enlarge upon the mandate of the Congress as to venue in such patent actions would be an intrusion into the legislative field."

If it is beyond the power of a court to enlarge upon an existing act, it is clearly beyond the power of a court to adopt a reapportionment plan for a state when the Constitution of that state delegates that power to the Legislature. In like manner, the powers of a court of equity have traditionally been construed to be limited to decrees either *in personam* and to a lesser degree *in rem* and not to extend to situations where the court itself performs the duty decreed. *Hart* v. *Sansom,* 110 U. S. 151.

Finally, the Court believed the possibility of an at-large election might induce the Illinois General Assembly to perform its duties and enact a valid reapportionment map. There is every hope that this plan may be successful. Each House of the Illinois General Assembly has passed a legislative reapportionment bill and the issue is now before a joint conference committee. If this committee can agree on a compromise bill which complies with all constitutional requirements, there will be no need for the Court's remedial order to take effect. If the possibility of an at-large election can aid such an agreement, the order will have been eminently successful.

We respectfully submit, therefore, that the appellants present no substantial question for the decision of this

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Court and that the judgment and decree of the District Court should be affirmed.

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Dated May 24, 1965

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